

Marsak Leasing, Inc. and General Teamsters, Chauffeurs, Warehousemen and Helpers of America, Building Materials, Heavy and Highway Construction Employees, Local Union No. 404, a/w International Brotherhood of Teamsters, AFL-CIO. Cases 1-CA-28375 and 1-CA-29051

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On March 24, 1993, Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel resubmitted his posthearing brief in support of the judge's decision and filed cross-exceptions to the judge's decision and a supporting brief.

The Board has considered the decision and the record in light of those exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Marsak Leasing, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(b) and reletter the remaining paragraphs accordingly.

“(b) Remove any reference to any disciplinary warning placed in Chester Janek’s file prior to his January 21, 1992 discharge and notify him in writing that this has been done and that those warnings will not be used against him in any way.”

¹ The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The General Counsel has excepted to the judge's failure to require removal of any disciplinary warning that may remain in Chester Janek's file. Because the Respondent revived a warning given Janek earlier in December as a basis for unlawfully discharging him the following January, we shall modify the order to require removal of any reference to any predischarge warning from Janek's file. We agree, however, with the judge that the record does not support the General Counsel's contention that the warning itself was based on Janek's union or other protected concerted activity, and we premise our extension of this expunction remedy solely on the judge's finding that, as of late December 1991, Janek was told his record was clear. We shall also amend the notice to reflect the modified remedy.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting General Teamsters, Chauffeurs, Warehousemen and Helpers of America, Building Materials, Heavy and Highway Construction Employees, Local Union No. 404, a/w International Brotherhood of Teamsters, AFL-CIO or any other union or for engaging in concerted activity for your mutual aid or protection.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with discharge or other reprisals because you engage in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Chester Janek immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove any disciplinary warning placed in Chester Janek's file prior to his discharge and WE WILL notify him of the removal and that those warnings will not be used against him in any way.

WE WILL notify Chester Janek that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

MARSAK LEASING, INC.

Kevin J. Murray, Esq., for the General Counsel.
Robert Weihrauch, Esq., of Worcester, Massachusetts, for the Respondent.
Michael J. Catanzaro, of Springfield, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Deputy Chief Administrative Law Judge. The charge in Case 1-CA-28375 was filed June 14, 1991. A complaint issued on July 24, 1991, and on December 11, 1991, the parties entered into an informal settlement agreement. On January 24, 1992, the charge in Case 1-CA-29051 was filed, and on March 25, 1992, the Regional Director issued a complaint in Case 1-CA-29051 and an order setting aside the settlement agreement in Case 1-CA-28375 and consolidating the cases. The consolidated complaint as amended at the hearing alleges that Respondent interrogated employee applicants concerning their union sympathies, threatened employees with reprisals, warned and then discharged Chester Janek because he engaged in concerted and union activities, and told employees that Janek was discharged because of his union and concerted activities. Respondent denies the commission of any unfair labor practices.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Springfield, Massachusetts, where it leases tractors, trailers, and drivers to other employers. It provides services annually valued in excess of \$50,000 outside of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Interrogation of employee applicants

In March 1991,² Respondent began operations at Springfield where it serves a single customer, Novacor Chemical Co. Respondent transports styrene monomer, a hazardous chemical, in tank trucks from a Novacor facility in New Haven, Connecticut, to Novacor's Springfield plant, located near Respondent's terminal. It also transports bulk plastic pellets in trailers from Novacor's Springfield plant to locations throughout the United States and certain provinces in Canada. Respondent also has operations at other locations, including Worcester, Massachusetts, where its president, Seder, has his office.

Before Respondent began operations at Springfield, Norman Sirk, an agent of Respondent, interviewed applicants for driver positions. During his interview, David Kaplan asked

Sirk if the Company was a union company. Sirk replied, "No, and I don't want a Union."

During George Robert's interview, Sirk asked Robert what he had earned at his previous job. When Robert replied, Sirk told him that he was not going to make that much with Respondent and asked if his previous job had been a union job. Robert replied that his three previous jobs had been union. Sirk said that he was concerned because most of the drivers with good records were former union employees. Sirk asked Robert how long he had been in the Union, and Robert replied that he had been in the Union 18-1/2 years. Sirk said that the job for which he was interviewing would not be a union job and that he did not want it to be. Robert said that he had been through an organizational campaign once before, that it had left him with a bad taste in his mouth, and that he did not want to go through another. He added that if he wanted to pursue another union job he would find one. Sirk said nothing further about it.

Sirk also interviewed Steve Malke. As Sirk read through Malke's resume, he asked Malke if his last job had been a union job. Malke said that it was. Sirk asked how long Malke had been in the Union, and he answered that he had been in two different unions for about 20 years. Sirk said that the Employer did not want a union, that it would not be a union job, that it would be a good company to work for, and that they would treat drivers like one big family. Sirk asked Malke if he was for the Union. Malke answered that he could take it or leave it. Respondent hired Kaplan, Malke, and Robert as drivers.³

2. Janek's union and concerted activity

In the spring 1991 the Union began an organizing campaign among the approximately 13 drivers and mechanics at the Springfield terminal. Chester Janek signed a union authorization card on May 11, attended a number of union meetings, and was identified in a letter to the employer as one of five members of a union organizing committee. Steve Wilder and Steve Malke, who were still employed by Respondent at the time of the hearing in this case, were also members of the organizing committee as were two other employees no longer with Respondent.

On May 14 the Union filed a representation petition seeking an election among the drivers and mechanics. Janek and one other member of the organizing committee attended the representation hearing on behalf of the Union and was present on August 22 when the ballots were opened and counted. The vote was 7 to 5 against union representation.

During the preelection period Respondent held a meeting with the employees at which Sirk and Respondent's president, Seder, asked employees why they wanted a union and what Respondent was doing wrong. Janek spoke and said that the styrene drivers were dissatisfied with pay rates and shifting company policies. Sirk and Seder said that they would try to straighten things out and that they were a new company. They asked the employees to give them a break.

There is no question that Seder was aware of the union activity and of Janek's participation in it. Kent Pilarski who became Springfield terminal manager after the election,

¹ Errors in the transcript have been noted and corrected.

² The dates which follow fall within the period between March 1991 and January 1992, unless otherwise indicated.

³ These findings are based on the uncontradicted testimony of Kaplan, Robert, and Malke. Sirk did not testify.

learned about Janek's union activity from Janek. Pilarski was not aware of the union activity of others.

Pilarski, who became terminal manager after the election, considered Janek the most outspoken of the drivers about his own and other drivers' working conditions. Some of the conditions Janek complained about were difficulties with completing daily runs within 12 hours as required by Government regulation, fairness of assignments, the requirement that drivers wash their equipment, and driver pay. Janek almost always came to Pilarski with Wilder who was in agreement with him on issues.

3. The December tailgating incident

On December 12, when Janek returned to the terminal from his runs as a styrene driver, Pilarski told Janek that he had seen him that morning going out on his second run and that he had been awfully close to a pickup truck, tailgating. Janek denied that he ever tailgated, and Pilarski repeated that he had seen it. Janek then said that he wasn't going to argue with Pilarski and that he had to push the pickup out of the way.⁴ At some point during the day Pilarski told Seder about it and made a notation in Janek's file.⁵

4. The Christmas bonus and party

On December 12, Respondent gave all employees, including Janek, a \$100 bonus and a blue blazer. The bonus was enclosed in a letter which thanked the employees "for making our first nine months happen" and stated among other things, "We've had some ups and downs adjusting to our customer's demands, survived the vote, and the company, with your efforts, has survived."

On December 24, Respondent had a Christmas party for the drivers and the terminal manager. Previously in October Respondent had placed a written warning in Janek's file which Janek had protested and asked Seder to rescind on several occasions. At the Christmas party Seder handed that warning to Janek, saying, "Here's a Christmas present." Janek thanked him, and Pilarski who was present commented that Janek's file was now empty and that he was clear.⁶

5. Resetting the styrene truck governors

Styrene drivers haul empty trailers from Springfield to Novacor's New Haven facility where they are loaded with styrene. Then they return to Novacor's Springfield plant, where they unloaded. The distance between the Novacor facilities is approximately 74 miles. All but about 4 miles is over interstate highways with a 55-mile-per-hour speed limit. Because of the hazardous nature of the styrene, Novacor and

Respondent are concerned about safety and speed limits. In April, May, and July Respondent posted notices reminding drivers of the importance of observing speed limits and the law.

Respondent expects drivers to observe speed limits, but it sets the governors on its trucks to permit a greater maximum speed to give drivers extra power when going uphill and for safety in emergencies. Before January at least some of the styrene truck governors, including Janek's and Wilder's, were set for a top speed of 68 miles per hour.

Respondent schedules runs between Springfield and New Haven in response to information from Novacor as to the number of loads it needs each day. In a normal workday, Respondent has five drivers hauling styrene and schedules each of them to make three round trips between Springfield and New Haven. As Novacor's needs vary, schedules change, and each afternoon Terminal Manager Pilarski posts a schedule for the next day.

Respondent's styrene drivers are subject to Department of Transportation regulations which require that drivers must maintain records of their working time as evidence that they have complied with DOT requirements relating to driving and rest time. Because the styrene drivers do not travel more than 100 miles from their home terminal and return to it each night, they have the option to keep a 24-hour log or to keep timecards showing that they have returned to their home terminal and have been released from work within 12 consecutive hours after reporting for work. An exception to the 12-hour rule is provided for adverse driving conditions not known to the dispatcher at the time the run began.

To meet the recordkeeping requirement, Respondent's styrene drivers chose to punch a timeclock when they report to the terminal in the morning and when they return after their last run. However, drivers are paid on the basis of each run completed, and the recorded times do not affect their pay.

At the time they were hired, the styrene drivers were told that they would have three runs a day between Springfield and New Haven, and the rate per run was based on that assumption. During the spring, the drivers complained that they were unable to complete three runs within the 12-hour period they were permitted to be on duty. In response Respondent increased the rates that it paid per trip. Thereafter, changes in Novacor's operation reduced the amount of time drivers had to wait to load and unload their trailers, and it became possible for them to make three round trips in a day. The rates were not reduced.

Facilities at the Novacor plants in New Haven and Springfield permit two trucks to be loaded and unloaded simultaneously. Drivers usually travel in pairs so that if something happens to one of them the other driver can help. While Respondent leaves it up to the drivers, Respondent encourages the practice. Janek usually paired with Steve Wilder in making his runs, and they were the first to start each day, leaving the Springfield terminal for their first run at 3 a.m. Other drivers started later to avoid waiting to load and unload at the Novacor facilities. Malke and Robert traveled together with a later starting time, and Kaplan, the fifth regular styrene driver, usually traveled alone and started at a different time.

The normal driving time for the styrene drivers between Springfield and New Haven varied from 1 hour and 15 min-

⁴These findings are based on a composite of the testimony of Janek and Pilarski, neither of whom I totally credit as to this incident. Having observed Janek and considering his outspokenness about working conditions, I do not believe that he would have simply conceded Pilarski's charge, as Pilarski testified. More likely to me is that he initially denied the charge, as he testified, but that when Pilarski refused to accept his denial, he answered that he wasn't going to argue and added, perhaps with some sarcasm intended, that he had to push the pickup out of the way.

⁵I credit Janek that he was not given a copy of the notation in his file or told about it.

⁶Malke corroborated Janek's uncontradicted testimony as to this conversation.

utes to 1-1/2 hours, depending on time of day and driving conditions.⁷

In early January 1992,⁸ at Novacor's request, Respondent instructed its mechanic to reset the governors on all the styrene trucks to provide a maximum speed of 62 miles per hour. The drivers had been told that the change was to be made. After the change Janek and Wilder discovered that Janek's top speed was only 58 miles per hour which slowed them down. Janek discussed his concerns with other drivers by CB when they passed on the road and with Wilder who was traveling with him. He and Wilder agreed that they would talk to Seder about it and see if he would straighten it out. When they returned to the terminal that night, they complained to Pilarski that because Janek's governor was set too low, each trip took them longer and that it was impossible to complete their runs within 12 hours or to stop to take a break or eat lunch. Other drivers also made comments to Pilarski about Janek's truck, and all of them talked about it. As Pilarski put it, "They're a tight-knit group and they discuss everything. Most of them do at least." On one or two occasions after Janek's governor was set back, he and Wilder refused to make their third run for the day because they could not complete it within 12 hours.

A day or two after Janek and Wilder complained to Pilarski, they spoke to Seder, telling him that Janek's truck was going too slow, would only do 58 miles per hour, and prevented them from completing three runs within 12 hours. Seder said that they were all set at 62. When Janek repeated that his would only do 58, Seder told Janek that he didn't believe him, but that he would check it, adding, "If you don't care for the way the trucks are going and this is going, don't let the door hit you in the rear end on the way out."⁹ A day or two later, Seder called Janek at home and told him that the governor had been set wrong and that it had been adjusted.

6. Janek's January 16 run

On January 16 Janek arrived at the Springfield terminal at about 2:30 a.m., started his truck and Wilder's, punched in their timecards, and went out to his truck to wait for Wilder. When Wilder did not appear by 2:55, Janek called Wilder at home and learned that he was not coming in. Janek shut off Wilder's truck and left for New Haven. As he approached Hartford the road started to get slick, and he observed a pickup truck in the northbound lanes hit the median and flip

over. He stopped briefly and then continued on to New Haven. It was snowing somewhat, but the snow was not sticking on the road, and after he passed Meriden it appeared to clear up.

He arrived at the New Haven terminal at 4:29 a.m. Kaplan, who usually made his runs alone, was there filling his tank and was about ready to leave. Janek told Kaplan about the accident he had seen and the deteriorating conditions near Hartford. They agreed that as each was alone, Kaplan would wait for Janek, and they would make the run back to Springfield together. Janek's truck was loaded and weighed out at 4:55 a.m., and they left together, remaining together for the entire trip. After they passed Meriden, the roads started to get slippery. As they approached the Massachusetts border, the roads became worse, and the road sanders were not out. Both arrived at the Novacor plant at 6:30 a.m. to unload. They discussed whether they should make another run in view of the road conditions. Kaplan said that he was going to because he needed the money.

Janek went back to Respondent's terminal and called Pilarski at his home at about 7:30 a.m.. He told Pilarski that it was bad and was getting worse. Pilarski told him to wait at the terminal about half an hour while he checked with the state police on road conditions. About 10 minutes later, Pilarski called Janek at the terminal and said that the state police reported that the roads were getting worse and that the styrene tankers did not belong on them. Pilarski said that he could go home and call him in the afternoon to find out the schedule for the next day.¹⁰

During the morning Pilarski received a call from Novacor's production manager informing him that Novacor needed more styrene and demanding that the product be delivered. Pilarski tried to reach Janek at 10 a.m., noon, and 2 p.m., and left messages on his answering machine, but when Janek did not return the calls, Pilarski asked two bulk drivers, Richard James and Robert Dodge, who were coming in from their normal bulk runs, to haul loads of styrene to make up the deficit. Sometime during the day Pilarski spoke to Seder and told him what had happened.

Janek was away from his home for at least part of the day. When he returned home at about 2:30 p.m. there was a message on his answering machine to call Pilarski. Pilarski told him that he had tried to reach him because the weather had

⁷ Drivers spend approximately one-half hour at each end loading and unloading styrene. Thus, out of the 12-hour period in which they are normally expected to complete three round trips, approximately 3 hours are spent loading and unloading, leaving approximately 3 hours driving time for each round trip. At an average speed of 50 miles per hour, the 74-mile trip each way would take 1 hour and 25 minutes. As all but 4 miles of the trip is on interstate highways, it appears that a 50-mile-per-hour average speed is not impossible. Indeed, a slower average speed would make it unlikely that a driver could complete three round trips in 12 hours.

⁸ It is unclear from the record when the governors were reset, but it appears most likely that they were reset on Saturday, January 11.

⁹ Janek and Wilder both testified to this conversation. Seder was not asked specifically about the quoted comment but denied that he was upset by Janek's complaint about the setting of the governor on his truck. For reasons set forth below, I have credited Wilder where his testimony is in conflict with Seder's testimony, and I credit Janek and Wilder here.

¹⁰ Janek so testified. Pilarski testified that he told Janek to wait for him at the terminal, that he could not recall whether Janek was still there when he arrived, that Janek said he was going home, and that he told Janek that he would reach him at home because company policy was to wait to see if conditions improved enough to complete the run. According to Pilarski the state police told him that there were no unusual problems or delays on Interstate 91, and he tried unsuccessfully to reach Janek at home at 10 and at noon to ask him to return to complete his runs. I have credited Janek and not Pilarski as to their initial conversation on January 16. Pilarski did not state when he first called the state police, but it is likely that he called them soon after Janek's call. If he learned at the time of that call that the trucks could run, it is doubtful that he would have waited until 10 a.m., 2-1/2 hours after Janek called him, to try to reach Janek and ask him to return to work. I find it more likely that at the time of Janek's and Pilarski's conversations in the morning, Pilarski had contacted the state police, was told that the road conditions were getting worse, concurred in Janek's decision to go home, and only later learned of improved road conditions, causing him to try to recall Janek when the Novacor contacted him.

cleared and he wanted Janek to make a run. Janek said he was sorry but he had gone out, and asked if Pilarski needed him then. Pilarski said that that other drivers had covered it and told Janek that he had no runs scheduled for the next day.

Wilder and Malke also did not work on January 16. Earlier that morning Wilder called Pilarski at home to tell him that he could not get out of his driveway because of the snow. Malke also decided not to go in because of the weather and called Pilarski at his home to say that he would not be in. No one tried to reach him that day to come into work.

7. The January 20 timecard incident

On January 20, Janek arrived at the terminal at about 2:30 a.m. He started his and Wilder's trucks, went in the terminal, printed his name and Wilder's on two blank timecards, punched them, put them in the rack, and went outside to wait in his truck for Wilder who usually arrived at about 2:55 a.m. Wilder didn't come and Janek called his house. Wilder said he was sick, so Janek shut off Wilder's truck, and left on his run.

Wilder called Pilarski at his home at approximately 2:55 a.m. and said that he was not coming in because he was sick. When Pilarski arrived at the terminal later that morning, he noticed that Wilder's timecard was punched, but Wilder's truck was there. He checked the other cards and realized that the only person who could have filled out and punched the timecard was Janek. Pilarski took the timecards and reported what he had discovered by telephone to Seder.

8. Janek's discharge

Seder testified that he decided to discharge Janek during the day on January 21 because of the December warning given to him by Pilarski and Janek's conduct on January 16 and 20. Seder testified that his investigation leading to the discharge began during the afternoon on January 16 when Pilarski told him that Janek called him at home that morning, told him that the driving conditions were severe that the level of the Novacor tanks was at 70 percent, and that he was not going to go out for another load. According to Seder, Pilarski said that although he had told Janek to stay at the terminal while he called the state police and came to the terminal, Janek said that he was going home. Seder testified that Pilarski recounted that he told Janek that he would call him as soon as he got to the terminal and that depending on the conditions of the road, he needed him to go out. However, according to Seder, after Pilarski checked with the state police and learned that the roads were fine and that other drivers were making their runs, Pilarski was unable to reach Janek at his home and dispatch him. According to Seder, he told Pilarski that he was very concerned because Janek told Pilarski that the tanks were at 70-percent capacity and that the customer didn't need the product when the drivers had been told that that was not their decision.

Seder testified that he went to the Springfield terminal the next day to look into what the other drivers had done at a time Janek said that weather conditions kept him from driving. Seder went to the Novacor plant and obtained a copy of the styrene monomer receiving log which showed when the drivers arrived at and left the plant. On the next work day Seder looked at the bills of lading for Kaplan's and

Janek's loads which arrived at his Worcester office. They showed when Janek and Kaplan weighed out at New Haven on January 16. After looking at these documents, Seder decided that Janek had made the run in an hour and a half under what he said were adverse weather conditions. He noted further that Kaplan was weighed out of the New Haven terminal half an hour before Janek but arrived at the Novacor plant at the same time as Janek to unload. He testified:

Knowing the instructions that I had given to all of the drivers relative to the nature of the product, the commodity, the hazardness of this commodity and the fact that he did, in an hour and a half, in adverse driving conditions, what he had said takes two hours under good conditions to do, I determined that Mr. Janek was driving in an unsafe manner, did not follow the instructions that were issued by the company and did not—and disobeyed the directive relative to questioning the capacity of the tanks.

Seder testified he also concluded that Janek had disregarded instructions from Pilarski to remain available after he went home on January 16.

Seder made no further investigation of Janek's conduct on January 16, and did not talk to Janek or any of the other drivers about it before he discharged Janek. Seder testified that he believed that all the drivers who were scheduled to work on January 16 did so, and that drivers who did not work had not been dispatched.

Seder testified that he had been aware of the tailgating warning in Janek's file from the time that Pilarski gave it to Janek in December, but that before he decided to discharge Janek, he also investigated the January 20 timecard incident. He testified that while there was no company policy on punching timecards, Janek's conduct violated Federal regulations, and it was company policy to abide by Federal regulations. Other than looking at the timecards, Seder made no further investigation of that incident.

On January 21 at about 7:30 in the evening, Seder telephoned Janek at his home and told him that that he was discharged. According to Janek he asked why, and Seder said that it was because he had "a bad attitude." Janek testified that he asked Seder what he was talking about, and Seder said that was what he was terminating him for, "you have a bad attitude, you don't have a company attitude." According to Janek, Seder would give him no other reason.

According to Seder, when he told Janek that he was fired, Janek asked why, and Seder told him that a series of three events led him to his decision. He testified that he stated each of the reasons and elaborated on them. He told Janek that was not the way he ran his operation, that Janek was not conducting himself as he had been told to, and that in his opinion "that is a lousy attitude." He testified that when he told Janek that based on the information he had Janek was driving at an excessive rate of speed, he did not recall mentioning Kaplan, and that Janek said that he was making a big mistake but said nothing about Kaplan to him.

9. Statements by Seder to Wilder, Malke, and Robert after Janek's discharge

The night after Janek's discharge Seder called Wilder at home. Wilder asked him if this was one of his 8 o'clock phone calls. Seder asked him what he meant, and Wilder replied that Seder called everybody at 8 o'clock and fired them, with apparent reference to Seder's call the night before to Janek. Seder asked if Wilder thought he deserved to be fired. Wilder said no, and Seder said that was not why he was calling. He told Wilder he just wanted to have a talk with him at the terminal.

Two days later when Wilder returned from his last run, Seder was at the terminal and asked Wilder to accompany him to a nearby restaurant. There Seder told Wilder that he was giving him a final warning and that he wanted him to change his attitude and stop complaining. Seder told him that he had taken into consideration the personal misfortunes Wilder had suffered in the last couple of years and that was why he was warning him, but that if his attitude did not change he would be fired. Seder also told Wilder that if he wanted to fire any one for union activity he could have at any time, but that was not the case with Janek and that he did not fire Janek for union activity. Wilder said that he would like Seder to talk to Pilarski because he was turning drivers against each other by saying different things to different people. Seder said that he would talk to Pilarski. After this conversation Wilder curtailed his complaints.¹¹

Within a few days after Janek's discharge, Seder saw Robert and Malke at the Novacor terminal while they were unloading. Seder told them that he felt bad that he had to let Janek go, that he had never really fired any drivers before, but that he couldn't have somebody with that attitude working there. Neither Robert nor Malke said anything in response.¹²

¹¹ These findings are based on the testimony of Wilder who was still employed by Respondent as a driver at the time of the hearing and had more reason to shape his testimony to support than to oppose his employer's position. *Midwestern Mining*, 277 NLRB 221 (1985). Seder testified that he met with Wilder at Wilder's request and that Wilder told him that he wanted to let Seder know that after he cut back the governors, Janek "was on your back, constantly, and relentlessly, and would not let up. And in my opinion, he was going too far, he should not have pushed you." According to Seder, Wilder said that he hoped that Seder did not have anything against him, and Seder assured him that he had nothing against him and that the complaints had nothing to do with the reason Janek was terminated. Seder also testified that he did not feel that Janek had been out of bounds in the way he had talked to him.

Thus, according to Seder, Wilder sought to make his peace with Seder after Janek's discharge and should have had no reason to fear reprisals from Respondent for testifying in this proceeding. Yet Pilarski testified that shortly before the hearing Wilder speculated that he might lose his job if he testified, causing him to think about having a memory lapse on the stand. If Seder and Pilarski are to be believed, Wilder needlessly went out of his way immediately after Janek's discharge to dissociate himself from Janek's conduct, needlessly expressed fear of reprisal by Respondent if he testified, and then in an inexplicable turnabout proceeded to misrepresent his conversation with Seder in his testimony. I credit Wilder and not Seder where their testimony is in conflict.

¹² Robert and Malke both testified to this conversation. Seder testified that he explained to them the reasons why he discharged Janek. Seder conceded that he may have said that Janek was not a team player or that he had a bad attitude but testified that it was in the

10. Statements by Pilarski

Within a month after Janek's discharge, Pilarski told Malke that he was sorry that Janek was gone, that Janek was a good worker, and that it was not his decision. He also said that since Janek was gone, there were no more complaints about the hours. Later, in the spring or early summer when several drivers were talking among themselves at the terminal about what happened to Janek, Pilarski commented that Janek was a troublemaker.¹³

About 10 days before the hearing in this case, Wilder and Pilarski spoke about the subpoena Wilder received to testify in this case. After discussing how the drivers would cover runs during the hearing, Wilder said that he hoped that they all had jobs after the hearing was over. Pilarski said, "It kind of makes you wonder whether you ought to be a little afraid to get up on the stand and whether you're going to get amnesia to keep your job." Wilder replied that he would answer whatever was asked as honestly as he could.¹⁴

B. Concluding Findings

1. Interrogation

I find that Respondent violated Section 8(a)(1) of the Act when Sirk asked Malke and Robert about their previous union employment and membership during their job interviews and expressed his determination to operate without a union. *Active Transportation*, 296 NLRB 431 fn. 3 (1989); *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988).

In Kaplan's case, his testimony shows that Sirk did not question him about his prior union affiliation, but he raised the subject of a union in his prehire interview. In his brief the General Counsel moves to amend the complaint to add a paragraph alleging that Sirk's reply to Kaplan, that Respondent was not a union company and did not want a union, was coercive. While I believe that the allegation is closely related to the allegation that Sirk interrogated employee applicants and that the matter was fully litigated, I find that Sirk's response to Kaplan does not establish coercion. In *Kessel Food Markets*, 287 NLRB 426, 428-429 (1987), cited by the General Counsel, the respondent potentially was a successor employer with a bargaining obligation depending on the number of employees of the former employer it chose to hire. In those circumstances the statement that the stores would operate nonunion conveyed the intent not to hire employees because they had been represented by

context of the incidents for which he terminated Janek and that he regarded one who did those kinds of things and jeopardized the whole operation as one who was not a team player and had a bad attitude. I have credited Robert and Malke, both current employees, and do not credit Seder that he explained the reasons for Janek's discharge or explained what he meant by Janek's attitude in view of his clear meaning when he spoke to Wilder.

¹³ These findings are based on the uncontradicted testimony of Malke and Kaplan.

¹⁴ Wilder so testified. Pilarski testified that Wilder's testimony was accurate except that the words Wilder attributed to him were spoken by Wilder. He testified that Wilder said that if he testified he might lose his job and that it makes people think about having a memory lapse on the day of the hearing. Pilarski said nothing in response except a little "hmmm." He testified that he knew not to say such things and that he would not jeopardize or threaten an employee with discharge. I have credited Wilder.

the union and was coercive. In *Willmar Electric Service*, 303 NLRB 245 (1991), the respondent's representative stated that it did not have a union and intended to stay that way, not merely that it did not want a union.

2. Threats attributed to Seder

a. *The 10(b) defense*

Respondent contends that the allegations in paragraphs 7(b), (c), and (d) of the complaint are barred by Section 10(b) of the Act. These allegations were added to the complaint by amendment at the hearing more than 6 months after the charges in this case were filed. However, each is closely related to the allegations of the charge in Case 1-CA-29051 and not barred by Section 10(b). *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959); *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Overnite Transportation Co.*, 296 NLRB 669 (1989).

b. *The threat to Wilder*

When Seder spoke to Wilder a few days after Janek's discharge, Seder threatened Wilder with discharge if he did not change his attitude and stop complaining. There can be no doubt that by attitude Seder meant protected concerted activity. There is no evidence relating to Wilder's job performance even to suggest that Seder was referring to Wilder's attitude toward his work, and Seder directly linked his attitude to his complaints, in which he usually and most recently had joined with Janek.

Janek and Wilder had acted concertedly in complaining about the resetting of the governor on Janek's truck. While Janek was employed, he and Wilder made other complaints, sometimes with the support of the other drivers. Although Seder professed to be unaware of it, Pilarski considered Janek a trouble maker who got the other drivers riled up. Principal among those he riled up was Wilder. As Pilarski put it, Janek and Wilder almost always came to him as a pair in agreement, "It was almost like they were finishing each other's sentences." I do not credit Seder's testimony that Pilarski never communicated these views to him or that he did not share them.

I find that Seder threatened Wilder with discharge because of his protected concerted activity and that Respondent thereby violated Section 8(a)(1) of the Act.

c. *Seder's statements to Robert and Malke*

Seder told Robert and Malke that Janek was discharged because of his attitude. Although Seder testified that he was referring to Janek's attitude toward the performance of his work, the record does not support the explanation. When Seder used the same word in his warning to Wilder, he tied it directly to Wilder's concerted activity with Janek, and as found below, examination of the reasons advanced by Seder for Janek's discharge supports the General Counsel's contention that the reasons given by Janek were pretexts and that Janek was discharged because of his protected concerted activity. In addition, I do not credit Seder that he explained the reasons for the discharge to Wilder, Robert, or Malke when he spoke to them after the discharge. I find that by Janek's attitude Seder referred to Janek's concerted complaints which were well known to and often joined in by the other drivers and that in the absence of any other explanation the drivers

were likely to have understood Seder as referring to Janek's protected activity. Accordingly, I find that Seder's statements to Robert and Malke conveyed the message that other employees might be discharged for a similar "attitude" and violated Section 8(a)(1) of the Act. *Edwards Restaurant*, 305 NLRB 1097 fn. 4 (1992); *M. K. Morse*, 302 NLRB 924 (1991).

3. Threats attributed to Pilarski

The complaint alleges that Pilarski threatened an employee with reprisals if he testified in this proceeding. When Wilder expressed concern to Pilarski over retention of his job if he testified in this proceeding, Pilarski did nothing to calm his fears, but indicated that they had substance by his response. Thus, he suggested that Wilder should be afraid to get up on the witness stand and might consider getting amnesia to keep his job. Pilarski's response could only fuel Wilder's fears of reprisal and interfere with Wilder's duty to respond to the subpoena he received and to testify truthfully. I find that Pilarski's statement to Wilder violated Section 8(a)(1) of the Act. *Eddyleon Chocolate Co.*, 301 NLRB 887, 903 (1991); *Overnite Transportation*, 297 NLRB 638 (1990).¹⁵

4. The discharge of Janek

The General Counsel contends that Janek was discharged because of his union and protected concerted activities and that the reasons advanced by Respondent for his discharge were pretextual. Respondent contends that there is no evidence of antiunion animus, that Seder was not upset over Janek's complaint about the governor on his truck, and that Janek was discharged for the reasons stated by Seder to Janek and at the hearing.

There is substantial evidence to support the General Counsel's contention that the reasons advanced by Seder for Janek's discharge were pretexts. I do not find that the December warning to Janek about tailgating was contrived after the fact, as the General Counsel contends. But I do find from what Pilarski told Janek at the Christmas party that Respondent either regarded it as insignificant or removed it from Janek's file along with the October warning in the interest of wiping the slate clean. The revival of the December warning as one of Seder's claimed considerations in deciding to discharge Janek suggests that Seder sought to justify a predetermination to discharge Janek rather than to determine whether there was cause to discharge him.

Seder's claimed reliance on the January 16 and 20 incidents is also suspect. In both cases Seder barely investigated. He jumped to the conclusion that Janek had been speeding without asking the most obvious questions. Despite Kaplan's identical arrival time at Novacor's Springfield plant and

¹⁵ The complaint as amended also alleges that during the week of January 27 Pilarski told employees at the Springfield terminal that Janek was fired because he engaged in Union and/or protected concerted activities. The only evidence of statements by Pilarski to employees after Janek's discharge consists of his statement to Malke within a month after Janek's discharge that since Janek was gone there were no more complaints about the hours and his statement to drivers in the lounge in the spring or early summer that Janek was a troublemaker. I find it unnecessary to decide whether either of these statements falls within the compass of the complaint as further findings based on them would in any event be cumulative.

company policy encouraging drivers to travel together, Seder never spoke to Kaplan or Janek to ask whether they had traveled together or what the road conditions were. While Janek's time may have been less than the 2 hours that Seder testified Janek had told him it took to complete a trip between the Novacor facilities, at 1 hour and 35 minutes it was more than the average time that a driver would need to maintain during a 12-hour day to complete three round trips between the facilities. At the very least, no conclusive inference could be drawn based on the time taken by Janek to complete the trip, and further investigation was required.

While Seder portrayed Janek's conduct as contrary to Respondent's policy concerning driving in bad weather, the evidence shows at best an ambiguous policy which was not applied to others as it was to Janek. Respondent's policy was contained in the following notice posted on December 12:

On 12/12/91, I spoke to Bud Early re: What to do with drivers, especially styrene, when weather becomes a factor.

We agreed the decision, because the tank has a large capacity, would be left up to us.

Accordingly, when drivers awake to come to the terminal and there is snow/sleet/ and/or freezing rain, they should call the terminal manager at home and he will call the State Police for an update and forecast. He will use his best judgement, which will be driven by our commitment to safety. No one will be forced into an unsafe situation. Good drivers discretion is expected.

Seder testified that he did not have a policy for a situation in which a driver felt that it was unsafe to drive and the report from the state police indicated otherwise. However, according to Seder, the last line of the memo meant that a driver was to take into consideration the needs of the customer, the condition of the roads as reported by the state police, and not just the driver's own opinion that the roads are slippery. In his view a driver could not refuse to drive just because he thought it was unsafe if no one else thought so. However, the only stated policy was contained in the posted notice, the last lines of which left unclear the extent to which drivers were free to exercise their own discretion, and other drivers apparently felt free to make their own decisions. Other drivers testified that they had refused to work in bad weather without disciplinary repercussions, and Wilder testified that on one occasion when Pilarski asked him to come back if the roads cleared up he refused without disciplinary consequence. Although Seder presumed without investigating that all drivers worked who were scheduled to drive on January 16, neither Malke nor Wilder reported to work on January 16, and neither was disciplined.¹⁶ The record shows that Respondent had an unclear policy which was not applied to other as Seder applied it to Janek.

With respect to the January 20 incident, Seder testified that company policy was to follow Federal regulations and that Janek violated Federal regulations by filling out and punching in a timecard for the absent Wilder. Seder made no

attempt to determine the circumstances under which Janek filled out and punched in Wilder's card. Although Seder and Pilarski denied any knowledge of practices of other drivers, Wilder, Robert, Kaplan, and Malke all testified that it was common practice for drivers to sign and punch in one another's timecards, on occasion with Pilarski present. Wilder and Kaplan also both testified to specific instances in which they called Pilarski before completing their work for the day and asked Pilarski to punch their cards in so that they would not appear to have run over the 12-hour daily limit. Before Janek's discharge drivers had not been told not to about punch timecards of others. Although they were told not to sign or punch in another driver's timecard after Janek's discharge, they soon reverted to their former practices without any disciplinary consequence.

I do not credit Seder's and Pilarski's denials of knowledge of the practices of the drivers. Although Respondent argues that punching a card in for an absent driver differs from punching the card of a driver who is present, I find that what Janek did was certainly no more violative of Federal regulations than Pilarski's complicity in the efforts of Wilder and Kaplan to evade the 12-hour rule. In the context of the practices of the drivers before and after Janek's discharge and in light of the fact that what Janek did had no impact on anyone's pay, I find that the timecard incident would have been ignored had anyone other than Janek been involved.

Finally, I credit Janek and not Seder as to the reason Seder gave him for his discharge on January 21. If Seder had told Janek the claimed reasons for his discharge, Janek was not the sort to fail to challenge Seder's reasons or point out that he and Kaplan had traveled together. Janek's version is consistent with what Robert and Malke testified Seder told them a few days later. I credit Janek that Seder told him that he was discharged because he had a bad attitude and not a company attitude.

All of the above supports the conclusion that the reasons advanced by Seder were not the true reasons for Janek's discharge. The record otherwise makes clear what the true reasons were. Contrary to Respondent, the evidence establishes Seder's hostility toward Janek based on his concerted activity. In the concerted activity which continued after the election, Janek was marked by Pilarski as the most outspoken driver and a troublemaker who riled up other drivers. There is no question from Pilarski's testimony that he was hostile toward Janek because of his concerted activity. While Seder claimed no knowledge of Pilarski's view of Janek, I have not credited him. Janek was discharged within days of the complaints by him and Wilder over the setting of the governor on Janek's truck and their refusal to make a third run in a single day because of their inability to complete it in the required time. The complaints signaled a renewal of Janek's "troublemaking" only a few weeks after Respondent made a conciliatory gesture to Janek by clearing adverse materials from his file. When Janek and Wilder told Seder of their complaint about the governor, Seder replied angrily that if they did not like working there, they should not let the door hit them on the way out, suggesting that they should quit. The day after Janek's discharge Seder arranged a meeting with Wilder to warn him that he would be discharged if he did not change his attitude and stop complaining. There is no ambiguity in what Seder meant by Wilder's "attitude." It equated to "stop complaining." Given the timing of the

¹⁶ Pilarski testified that on January 16 he may have tried to reach some of the other drivers and did not necessarily get an answer, that he imagined that he tried to call everyone but had no recollection whether he did or not. Malke testified that he was not called. Wilder was not asked.

warning to Wilder and the fact that Wilder's most recent complaints had been in concert with Janek, the inference is strong that Janek's discharge and the warning to Wilder were related actions taken for a common cause. I find that the record establishes that Janek was discharged because of his protected concerted activities in violation of Section 8(a)(1) of the Act.

The complaint alleges that the discharge was also caused by Janek's union activity. There is no question that Respondent opposed unionization of its drivers, and in its Christmas bonus letter to the drivers Respondent expressed gratitude for surviving the election. Janek's union activity, at least insofar as appears, ended with the counting of the ballots in late August almost 5 months before Janek was discharged. The evidence of antiunion animus dates from almost a year before the discharge when Respondent was interviewing prospective drivers. In the absence of Janek's later concerted activity, it is doubtful that Respondent would have sought to remove Janek in January because of his earlier union activity. As Seder told Wilder, he could have discharged Janek at any time because of his union activities. However, that is not the end of the matter. Concerted activity is intimately related to union activity and is often its precursor. The perception of employees that their working conditions are unsatisfactory is a prime motivator for seeking outside assistance from a union. Where there is a past history of union activity, the likelihood that continuing concerted activity will lead to renewed union activity is even greater. Despite Seder's self-serving denial to Wilder, I believe the inference is warranted that Respondent's reference to Janek's attitude in the circumstances encompassed not only his more recent protected concerted activities but also his earlier union activity. Accordingly, I conclude that Janek's discharge also violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By discharging Chester Janek because of his protected concerted and union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By interrogating employees concerning their union activities and threatening employees with reprisals for engaging in protected concerted activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Chester Janek, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper

offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Marsack Leasing, Inc., Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting General Teamsters, Chauffeurs, Warehousemen and Helpers of America, Building Materials, Heavy and Highway Construction Employees, Local Union No. 404, a/w International Brotherhood of Teamsters, AFL-CIO or any other union or for engaging in concerted activity for the purpose of collective bargaining or other mutual aid or protection.

(b) Coercively interrogating employees about union support or union activities.

(c) Threatening employees with discharge or other reprisals because they engage in protected concerted or union activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Chester Janek immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its facility in Springfield, Massachusetts, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized

¹⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.